24TH FEDERAL LITIGATION COURSE

DEFENDING LAWSUITS ARISING FROM MILITARY OPERATIONS

.

I. Introduction

A. Overview - military service materially different from civilian employment

1. Different rules govern
2. Emphasis on preserving good order and discipline of Armed Forces

B. Constitutional structure - Constitution grants exclusive responsibility for Armed Forces to legislative and executive branches. Courts have no role in governance of Armed Forces.

1. Congress shall have power to raise and support Armies;
2. to provide and maintain a Navy;
3. to make rules for the government and regulation of the land and naval forces (U.S. Const. art. I, § 8, cls. 12,13,14).
4. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States (U.S. Const. art. II , §2, cl. 1).

C. Types of claims arising from military service

1. FTCA
2. Individual capacity claims - *Bivens*; 42 U.S.C. § 1983
3. Statutory Claims - Title VII; ADA; ADEA, FLSA
4. State law claims - negligence

II. Representation Issues

A. Who Do We Represent

1. Representation governed by 28 C.F.R. § 50.15
   a. scope of employment
   b. interest of United States

B. Overview of Components of Armed Forces

1. Active-Duty Armed Forces - active duty military are always federal employees for representation purposes

a. 28 U.S.C. § 2671 - employee of the government includes members of the military or naval forces of the United States

b. Army, Navy, Air Force, Marine Corps, Coast Guard

c. Title 10 U.S.C. - Armed Forces

2. Reserves - Reservists are federal employees when in military status - Drill, Annual Training

a. Reserves: Army Reserve; Navy Reserve; Air Force Reserve; Marine Corps Reserve; Coast Guard Reserve

b. Governed by Title 10 U.S.C. - Armed Forces

3. National Guard - overview

a. National Guard is joint State/Federal military organization

I. Congress shall have power to provide for organizing, arming, and disciplining the Militia . . . reserving to the States respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. U.S. Const. art. I, § 8, cl. 16.

ii. Title 32 U.S.C. National Guard

b. 54 Separate National Guards (50 states, D.C., Puerto Rico; Guam, U.S. Virgin Islands)

c. Army National Guard; Air National Guard

d. Established 1636 - oldest component of Armed Forces

C. National Guard Representation - Guard soldiers and airmen are federal employees except when performing State active duty.

1. 28 U.S.C. § 2671 - employee of the government includes members of the National Guard when engaged in training or duty under section 115, 316, 502, 503, 504, 505 of Title 32.

2. Historic - *Maryland v. United States (ex rel Levin)*, 381 U.S. 41, 53 (1965) - Supreme Court holds that National Guard soldiers are State not federal employees for FTCA purposes.

3. 1981 Amendment to Federal Tor Claims Act, PL 97-124, December 20, 1981, 95 Stat. 1666 - Congress legislatively overrules holding in *Maryland* by amending FTCA's definition of federal employee (28 U.S.C. § 2671) to specifically include National

Guard soldiers when engaged in training or duty under Title 32.

a. Legislative history shows Congress's recognition that "there is substantial risk of personal liability by National Guard personnel engaged in federal training activity." H.R. Rep. 97-384, 1981 U.S.C.C.A.N 2692. Intent of amendment was to provide the National Guard the same coverage that exists for the active Armed Forces and its other reserve components.

b. § 2671 definition of federal employee controls for representation purposes.

c. Enumerated 32 U.S.C. sections cover all National Guard military training except State active duty.

I. 32 U.S.C. § 502 - Weekend Drill
ii. 32 U.S.C. § 503 - Annual Training
iii.32 U.S.C. § 505 - Schools

4. National Guard Technicians - Full-time Federal employees assigned to State military departments who are required to maintain membership in the National Guard as a condition of their federal employment.

a. National Guard Technicians Act of 1968 - 32 U.S.C. § 709

I. Technicians are employees of the United States - 32 U.S.C. § 709 (e)

5. Active Guard Reserve (AGR) - full-time Title 32 active-duty members of National Guard.

III. Intramilitary Immunity

A. *Feres v. United States*, 340 U.S. 135, 138 (1950).

1. 3 consolidated negligence claims against United States - barracks fire, 2 medical malpractice claims.

2. 28 U.S.C. § 1346(b) - facially broad waiver of sovereign immunity.

3. 28 U.S.C. § 2671 - contemplates that U.S. will sometimes be responsible for negligence of military personnel by including members of military and naval forces in FTCA's definition of federal employees.

4. 28 U.S.C. § 2680(j) - FTCA exception for "any claim arising from the combatant activities of the military or naval forces or the Coast guard during time of war."

5. 28 U.S.C. § 2674 - private party analogue - United States shall be

liable to the same extent as a private individual under like circumstances.

b. No private party analogue to soldier - no American law has ever permitted a soldier to recover for negligence against either his superior officers or the government he serves.

I. FTCA intended to waive sovereign immunity for recognized causes of action and was not intended to visit the government with novel and unprecedented liabilities.

6. Relationship between the Government and members of its Armed Forces is distinctively federal in character.

7. Availability of uniform system of compensation for injury or death arising from military service.

8. Incident to military service test - Supreme Court holds that the FTCA did not waive sovereign immunity for injuries to soldiers where the injuries "arise out of or are in the course of activity incident to service." 340 U.S. at 141-142.

B. *Feres* Progeny

1. *United States v. Shearer*, 473 U.S. 52 (1985) - off-base murder of private by another soldier. Mother alleges negligence by Army in supervision of murderer.

a. "*Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty." *Shearer*, 473 U.S. 52, 57 (1985) (internal quotation marks and citations omitted).

b. Situs of injury not nearly as important as whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline. *Id.* at 57.

c. Bars claims of the *type* that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

2. *Stencel Aero v. United States*, 431 U.S. 666 (1977) - National Guard pilot injured when ejecting from F-100 fighter aircraft sues manufacturer of ejection seat. Manufacturer brings cross-claim for indemnification against United States.

a. Held - third party indemnification action barred when direct action by soldier barred.

b. Reasoning - where case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. At issue would be the degree of fault on the part of the Government's agents and the effect upon the service member's safety. 431 U.S. at 673.

c. Key point - trial would, in either case, involve second-guessing military orders and would often require members of the Armed Services to testify in court as to each other's decisions and action. *Id.*

3. *United States v. Johnson*, 481 U.S. 681 (1987) - Coast Guard helicopter crashes during rescue mission killing all on board due to alleged negligence of civilian FAA air traffic controllers.

a. Held - *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service related injuries. Military status of alleged tortfeasor immaterial to application of doctrine. 481 U.S. at 687-88.

b. Reasoning- In 40 years since *Feres* decision Court has never deviated from the standard that soldiers cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." *Id.* Congress has not changed standard despite ample opportunity.

c. Key Points - *Johnson* reaffirms continued vitality of all three grounds supporting intramilitary immunity. Court emphasizes that because injury arose during performance of military duty, "the potential that this suit could implicate military discipline is substantial." 481 U.S. at 691-92.

I. Scalia dissent.

B. *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) - *Bivens* suit by Navy enlisted sailors against their commander, superiors officers, and NCO's alleging racial discrimination in duty assignments, performance evaluations, and disciplinary actions.

1. Individual capacity suit - generally look to military status of both plaintiff and defendant

2. Explicit recognition that *Feres* guides analysis in *Bivens* suit arising from military service although United States not a party. 462 U.S. at 299.

a. The special status of the military has required, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by

enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court. 462 U.S. at 303-04 (internal citations and quotation marks omitted).

3. Holding - taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted personnel a *Bivens*-type remedy against their superior officers. Id. at 304.

C. *United States v. Stanley*, 483 U.S. 669, 679-84 (1987) - soldier unwittingly subjected to secret LSD experiment brings *Bivens* claims against known and unknown individual defendants.

1. Court explicitly adopts arising from or incident to military service test as controlling in *Bivens* as well as FTCA actions.

a. We see no reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits.

b. Officer-subordinate relationship present in *Chappell* not necessary for application of intramilitary immunity.

2. Key Point - A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision making), the mere process of arriving at correct conclusions would disrupt the military regime. 483 U.S. at 682-83.

a. The arising from or incident to military service test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters. *Id.* at 683.

IV. Nonjusticiable Military Issues

A. *Orloff v. Willoughby*, 345 U.S. 83 (1953) - *Habeas Corpus* petition filed by physician drafted in doctor's draft who was denied commission in Medical Corps and instead assigned duties as private in medical lab because he refused to answer questions concerning Communist affiliations.

1. Military appointments not subject to judicial review - the commissioning of officers in the army is a matter of discretion within the province of the President as Commander in Chief. "Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission." 345 U.S. at 92.

2. Duty assignments not subject to judicial review - "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere in legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." 345 U.S. at 94.

B. *Gilligan v. Morgan*, 413 U.S. 1 (1973) - Complaint for declaratory and injunctive relief filed by Kent State University students seeking judicial evaluation of appropriateness of the training and weaponry of the Ohio National Guard and judicial supervision of future training and operations of National Guard.

1. Training, supervision, organization, equipping, and employment of Armed Forces nonjusticiable.

2. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.

3. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." 413 U.S. at 10.

C. *Aktepe v. United States*, 105 F.3d 1400, 1402-04 (11th Cir. 1997) - accidental firing of two live missiles from a United States Navy warship during a North Atlantic Treaty Organization (NATO) training exercise. The missiles struck a Turkish Navy warship resulting in several deaths and numerous injuries. *Id*. at 1402. The survivors of the Turkish sailors killed and wounded in the training accident filed wrongful death and personal injury claims against the United States under the Public Vessels Act, 46 U.S.C. App. §§ 781-790, and the Death on the High Seas Act, 46 U.S.C. App. §§ 761-768. .

1. Relying in large part upon *Gilligan*, the Eleventh Circuit holds that these tort claims present nonjusticiable political questions. *Aktepe*, 105 F.3d at 1402-04.

V. Remedial Statutes Generally Do Not Apply to Armed Forces

A. Absent an express directive from Congress, statutory remedies of general application such as Title VII, the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201 *et seq*., and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, do not apply to uniformed members of the Armed Forces.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., does not apply to uniformed members of the Armed Forces. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Kawitt v. United States*, 842 F.2d 951, 953 (7th Cir. 1988); *Hupp v. Department of the Army*, 144 F.3d 1144, 1147 (8th Cir. 1998); *Frey v. California*, 982 F.2d 399, 404 (9th Cir. 1993); *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987).

2. ADA and ADEA do not apply to uniformed members of the Armed Forces. *Coffman v Michigan*, 120 F.3d 57, (6th Cir. 1997)(holding that Title VII, the Rehabilitation Act, and the ADA do not apply to National Guard soldiers); *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991)(holding that Title VII and ADEA do not apply to uniformed members of the Armed Forces).

2. Bar applies to applicants for military positions as well as current members of Armed Forces.

a. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991), - unsuccessful applicant for a commission in the United States Navy brought Title VII and ADEA claims. The Second Circuit held that "Spain was applying for an officer position with the Navy, a uniformed position. Accordingly, he cannot allege any facts sufficient to support a Title VII claim . . . and his claims should therefore have been dismissed with prejudice." *Id*. *See also, Johnson v. Alexander*, 572 F.2d 1219, 1222-24 (8th Cir. 1978)(holding that "neither Title VII or its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the United States); *Moore v. Pennsylvania Department of Military and Veterans Affairs*, 216 F.Supp.2d. 446, 452 (E.D. Pa. 2002)(holding that "Title VII provides the same immunity from suit by enlisted personnel or applicants for enlistment in the National Guard that is provided to federal armed forces.)"

VI. 42 U.S.C. § 1983 Claims Against National Guard Soldiers

A. The Circuit Courts have unanimously applied the doctrine of intramilitary immunity to bar all service-related § 1983 claims against National Guard officers. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 51 (2nd Cir. 1999) (collecting cases); *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Jorden v. National Guard Bureau*, 799 F.2d 99, 106-108 (3rd Cir. 1986); *Holdiness v. Stroud*, 808 F.2d 417, 423 (5th Cir. 1987); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 770 (7th Cir. 1993); *Uhl v. Swanstrom*, 79 F.3d 751, 755-56 (8th Cir. 1996); *Wood v. United States*, 968 F.2d 738, 739 (8th Cir.

1992); *Bowen v. Oistead*, 125 F.3d 800, 804-05 (9th Cir. 1997); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984).

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